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SUPREME COURT OF THE UNITED STATES.

ORIGINAL, OCTOBER TERM, 1896.

No. 14.

EX PARTE: IN THE MATTER

OF

EDWARD ECKART,

PETITIONER.

BRIEF OF PETITIONER.

RUBLEE A. COLE,

Counsel for Petitioner.

ED. KEOGH, PRINTER, BROADWAY, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES.

ORIGINAL, OCTOBER TERM, 1896.

No. 14.

EX PARTE: IN THE MATTER OF EDWARD ECKART, PETITIONER.

BRIEF OF PETITIONER.

In the consideration of the application for a writ of habeas corpus and the rule to show cause thereon, it is desired to call the attention of the Court to certain statutes of Wisconsin:

"Writs of error and appeals, when taken. Section 3039. The time within which a writ of error may be issued, or an appeal taken, to obtain a review by the Supreme Court of any judgment or order in any civil action or special proceeding, in a court of record, is limited to two years from the date of the entry of such judgment or order, except as hereinafter provided, and except that if the person against whom a judgment is rendered is, at the time of the rendition thereof, either under the age of twenty-one years, or insane, or imprisoned on any criminal sentence for less than for life, the time during which such disability shall continue, not, however, exceeding ten years of disability, shall not be reckoned a part of said two years."

"Writs of error; bills of exceptions; motions for new trial. Section 4724. Writs of error in criminal cases may issued, and bills of exceptions may be served, noticed and settled, in the manner and within the time, and motions for new trial may be

made upon the same grounds, provided by law in civil cases, but no writ of error upon a judgment of conviction for an offense punishable by imprisonment for life shall issue unless allowed by one of the justices of the Supreme Court upon notice given to the attorney general; and no writ of error in any criminal case shall stay or delay the execution of the judgment, unless it shall be allowed by one of the justices of the Supreme Court, with an express order for such stay of proceedings; in which case, such justice of the Supreme Court may at the same time make such order as the case may require for the custody of the plaintiff in error or for letting him to bail, or such plaintiff in error may upon a habeas corpus procure his enlargement by giving bail if entitled thereto."

"Form of sentence. Section 4731. In every case in which the punishment of imprisonment in the state prison is awarded against any convict, the form of the sentence shall be that he be punished by confinement at hard labor, and he shall also be sentenced to solitary imprisonment for such term as the Court shall direct, not exceeding twenty days at one time; and in the execution of such punishment, the solitary imprisonment shall precede the punishment by hard labor, unless the Court shall otherwise order.

(Sec. 5, Ch. 150, R. S. 1849) Sec. 5, Ch. 181, R. S. 1858."

These sections are quoted from Vol. 2, Sanborn & Berryman Annotated Statutes of Wisconsin, and are the same numbered sections in the R. S. of Wis., 1878. The last section (4731) is identical with the section referred to in Benedict vs. State, 12 Wis., 313, 315-316.

From these statutes and reference to the date of the sentence in the record as an exhibit to the petition, it is seen that the time within which Edward Eckart might have applied for a writ of error in Wisconsin Supreme Court has long since expired, and that there is no relief for him unless he can obtain it upon this application.

Where a Court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits, does not render the legal or authorized portion of the sentence void, but only leaves such part of it as may be in excess open to question and attack.

United States vs. Pridgeon, 153 U. S., 48.
People vs. Baker, 89 N. Y., 460.
Graham vs. Weeks, 138 U. S., 461.

Most of the cases have arisen before the valid portion of the sentence had been served by the convict; yet it would seem that after the valid portion of a sentence had expired, that the petitioner ought to be discharged on habeas corpus.

People ex rel. Tweed vs. Liscomb, 60 N. Y., 559.
Graham vs. Weeks, 138 U. S., 461.
State vs. Gray, 37 N. J., 368.

After the valid portion of the sentence has been served it would seem that the excess is beyond the jurisdiction of the Court, and that the statement of Mr. Justice Miller in Ex parte Bigelow, 113 U. S., 328, on page 329, would be applicable, as follows:

"It is said, however, that the Court below exceeded its jurisdiction, and that this Court has the power, in such case and for that reason, to discharge the prisoner from confinement under a void sentence. The proposition itself is sound if the facts justify the conclusion that the Court of the District was without authority in the matter."

The purported verdict in the case of Eckart below must be in fact either a verdict or NOT a verdict.

If it was NOT A VERDICT, it seems difficult to comprehend how the petitioner is held by "due process of law," or how he has been duly convicted of murder in the first degree or any degree. How can it be called a verdict when it did not authorize the Court to pronounce judgment thereon when it was

received and the jury discharged? Suppose the jury had returned a page of an almanac as its verdict, and the Court had discharged the jury thereupon, and then proceeded to sentence the defendant for life, can it be possible that the prisoner must be forced to proceed by writ of error? Or if he did not so proceed through lack of knowledge or means within the time a writ of error could be applied for, is he forever precluded from a resort to a writ of habeas corpus, even where he has suffered the penalty of all grades of the offense except the highest grade?

The verdict in this case did not warrant nor authorize the Court to proceed to sentence.

Allen vs. State, 85 Wis., 22.
La Tour vs. State, 67 Northwestern Reporter, 1138.

If this purported verdict in Eckart's case was a verdict, certainly it was not a verdict of murder in the first degree, and he has never been duly convicted of murder in the first degree; and rather has been acquitted of that degree of the crime, as it would seem, within the decisions of the Wisconsin Supreme Court, that a conviction of a lesser grade of an offense is an acquittal of the higher crime.

See State vs. Martin, 30 Wis., 216.
Also State vs. Belden, 33 Wis., 120; p. 124.

Had the petitioner, within the two years after his conviction, allowed by law to apply for a writ of error, obtained a writ of error and a new trial, it is difficult to understand how he could legally be convicted of murder in the first degree under the foregoing decisions. This would seem to answer an objection found in the case of United States vs. Pridgeon, 153 U. S., 48, 62, 63, so far as it might be applicable to this case, to-wit:

"There is no law or justice in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void."

In view of the decisions of Allen vs. State, 85 Wis., 22, and Benedict vs. State, 12 Wis., 313, 316, it would seem that to have another trial of the petitioner before another jury (had he applied for a writ of error, and a reversal had; for how could a procedendo be awarded on writ of error where there was a verdict, so-called, upon which a sentence could not be awarded?), would have placed him twice in jeopardy.

McDonald vs. State: Graham vs. State, 79 Wis., 651.

This seems so to me, for in Wisconsin without a bill of exceptions the merits of the conviction can not be raised.

McDonald & Graham vs. State, 80 Wis., 407.
Peglow vs. The State, 12 Wis., 534.
Franz vs. The State, 12 Wis., 536.

It seems to me that the awarding of a procedendo, on writ of error, is not due process of law. (See McDonald and another vs. State, 80 Wis., 407, 409.) In any event, that it would not be in a case like this, where there was not a verdict upon which the Court was authorized to sentence; nor would the statute as to errors after verdict help it; so that, in that respect, it would not seem to be ruled by what is held on that subject in either Benedict vs. State, 12 Wis., 313, 317, or McDonald vs. State, 80 Wis., 407, 411, in which cases the verdicts were in proper and legal form. Further, if this be true, had Eckart taken a writ of error in season, without a bill of exceptions, it is insisted it would have been the duty of the Wisconsin Supreme Court to have reversed the sentence and discharged Eckart, as there was not in the Court below a verdict upon which sentence could be rendered; and certainly, it would seem, another trial before another jury could not be then had, as the verdict would not be questioned upon a writ of error, without a bill of exceptions, in a sense to authorize a new trial upon the merits of the case.

Sisson vs. State, 77 Wis., 273.
Rollins vs. State, 59 Wis., 55.

Could it be possible, and due process of law, that in such a case, to avoid the worthless verdict and to escape the rule as to twice in jeopardy, that these two cases could be avoided, and it be said that the prisoner waived the matter in merely taking a writ of error; for it would not be necessary to move to set aside the verdict in such a case, apparently, in order to obtain the decision that such a sentence was unwarranted on such a verdict? If no motion was made to set aside the verdict in the lower Court, and a mere reversal of the sentence had on writ of error above, would it not still be a double jeopardy if an attempt was made to have a trial before another jury,—on the defendant in the lower Court being remanded to that Court,—if he were remanded?

This may seem to be wandering from the case in hand, but it seems to me to clearly distinguish this case in several respects from the case of In re Graham, 74 Wis., 450, which latter case seems to have had so controlling a force in the decision of In re Eckart, 85 Wis., 681.

Thus it would seem that had Eckart sued out a writ of error alone, without settling a bill of exceptions, which he might have done within two years after sentence, without desiring to disturb this verdict, the State Supreme Court could not legally nor with due process of law have ordered him retried before another jury. If this be so, why can not his rights be secured by habeas corpus, for habeas corpus does not give him an acquittal when he is not entitled to it, but rather gives him his discharge, which it legally was the duty of the Circuit Court of Jefferson County, on the 13th day of April, 1878, to have given him, instead of a sentence, as the verdict was received and filed April 10th, 1878, and of necessity the jury was discharged on that day. After the discharge of the jury the Court was without authority legally to sentence,—except, perhaps, that right to render an erroneous decision, i. e., to sentence him when he should not have sentenced,—yet strictly the defendant had a right, it would seem, to have moved in arrest of judgment; and had such a motion been made, it would have been the legal duty of the Court to have granted such a motion upon such a

verdict. Could a lower Court, in duty and lawfully, in obedience to its oath, having received such a verdict, and then having such a decision as Allen vs. State called to its attention, lawfully sentence? Is not that the test? Would not its duty under the law call for a decision in arrest of judgment, in case such a motion had been made; had such a decision confronted the lower Court as Allen vs. State at the very moment the Court was called upon to sentence Eckart? Of course, these motions, so far as this matter is concerned, do not appear to have been made by the record, and are not stated for that purpose, but to arrive at the conclusion of what rights the petitioner ever had or now has.

One thing is clear, that the petitioner has never been convicted of murder in the first degree, for which he is now pretended to be held. Can it be said he is held by due process of law? It is submitted most respectfully that he is not, and that his detention conflicts with the constitutional provisions in these respects, and that this Court should issue a writ of habeas corpus and order the discharge of the petitioner thereon.

RUBLEE A. COLE,
Counsel for Petitioner.

Office Supreme Court, U. S.
MAR 22 1897
JAMES H. MCKENNEY,
CLERK.

166-481

SUPREME COURT OF THE UNITED STATES.

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SUPPLEMENTAL BRIEF OF PETITIONER.

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SUPPLEMENTAL BRIEF OF PETITIONER.

In reply to the brief of the Attorney General of Wisconsin it is respectfully submitted:—

FIRST.

The Attorney General attempts to question the only verdict which is a verdict in the case of State vs. Eckart below by attempting to assume that the jury might have been polled after the written verdict was received and that Judge Small then wrote in his private court calendar that Eckart was convicted of murder in the first degree. This is scarcely worthy of serious consideration. In Wisconsin the clerk of the Circuit Court keeps the minute book which is the official record of the proceedings had.

Sub-div. 4, Section 742, R. S. Wis., 1878.
Smith vs. State, 51 Wis., 615, p. 618, et seq.
Martin vs. State, 79 Wis., 165, p. 176.
French vs. State, 85 Wis., 400, p. 409, et seq.

The clerk's minutes on page six (6) of the printed return of the Warden as well as all certified verdicts in various portions of the record herein show clearly that the only verdict was a general verdict NOT stating the degree. The State Supreme Court so treated it.

In re Eckart, 85 Wis., 681.

The clerk's minutes import verity.

Peterson vs. State, 45 Wis., 535.

In the case of State vs. Glass, 50 Wis., 218, it is apparent from what is said at the close of page 224, that the jury were actually polled.

There is nothing in this case to show that the jury were polled; and no presumption of such a material proceeding is allowed in a criminal case; and not only that, there is nothing in the clerk's minutes to show, that, if the jury was polled, that the defendant was then present, which would be jurisdictional.

French vs. State, 85 Wis., 400, p. 408, et seq.

It would seem at least that it was necessary that the defendant should be present when a jury was polled; even, if in some cases, his attorney might be absent.

Smith vs. State, 51 Wis., 615, 619, 620.
Martin vs. State, 79 Wis., 165, p. 175.
Barnard vs. State, 88 Wis., 656, p. 659.

The fact of what Judge Small wrote in the calendar kept by him is no part of the record; and is in no way corroborated by the minutes of the clerk; and can not be aided by something which a clerk of court, many years after, certifies to. Not only this but the

judge's calendar utterly fails to show whether such entry was made in the presence of the jury and in the presence of the defendant and with their knowledge; or after asking the jury, if it intended their written verdict to stand as a verdict of murder in the first degree. As was said in Allen vs. State, 85 Wis., 22, p. 25, "the conviction and sentence must be founded upon the verdict of the jury, not the verdict of the court."

Whether or not such evidence would be competent, it is suggested that Judge Small is alive and his affidavit that he actually did poll the jury in this case, would be more pertinent than a certificate of a clerk, in office many years after the trial, and an attempt to draw some presumption therefrom. Of course an affidavit on such a subject would be objected to as an attempt to contradict and vary the clerk's minutes at the trial which are a verity.

SECOND.

The Attorney General states in his brief: "In the petition herein it is sought to make it appear that the trial of the petitioner was had before the Hon. H. S. Conger, and that the judgment of the court was pronounced by Hon. David W. Small, the presiding judge of another circuit, who was not present at the trial." The petition (printed page 2) asserts nothing of the kind; and on the contrary the affidavit of H. McElroy (Exhibit "E," printed petition pages 11 and 12), shows the fact.

The clerk's minutes show that Judge Small presided (page 4, printed return of Warden), and the certified copy of the sentence or judgment of the Court appears to show that Judge H. S. Conger was present and rendered sentence. The affidavit of H. McElroy was added as an exhibit, for what it was worth, and it is a doubtful question whether the record can be varied in such way. It is unintelligible otherwise. If it is in any way material, it would seem doubtful how one James L. Cook, who was not clerk at the trial and who asserts that he is clerk of Court many years after the trial, can certify that Judge D. W. Small was present and rendered sentence, contrary to the certified judgment and sentence.

THIRD.

It is not claimed in the original petition for a writ of habeas corpus in this case in this court, nor in the brief for the petitioner herein, that the Fifth Amendment of the Constitution of the United States in any way relates to this case, and it is not understood why the learned Attorney General discusses the subject.

FOURTH.

It is not seen wherein the other points, discussed by the Attorney General, affect this case, if the contention of the petitioner in his petition and brief are applicable hereto.

All of which is respectfully submitted,

RUBLEE A. COLE,

Counsel for Petitioner.

166-481

FEB 27 1897

United States of America.

IN SUPREME COURT.

14 Orig.

IN THE MATTER OF THE APPLICATION OF

EDWARD ECKART

FOR A WRIT OF HABEAS CORPUS.

ANSWER TO ORDER TO SHOW CAUSE.

W. H. MYLREA,

Attorney General.

DEMOCRAT PRINTING COMPANY, MADISON, WIS.

UNITED STATES SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF EDWARD ECKART FOR A WRIT OF HABEAS CORPUS TO INQUIRE INTO THE LEGALITY OF HIS IMPRISONMENT BY THE WARDEN OF THE WISCONSIN STATE PRISON.

To the Supreme Court of the United States:

John J. Roberts, to whom was directed an order of this honorable court, requiring him to show cause why a writ of habeas corpus should not be granted, as prayed in the petition of Edward Eckart, respectfully makes answer to this court and shows the following causes why a writ of habeas corpus should not be granted as prayed in said petition, to-wit:

That the said Edward Eckart is detained by the said John J. Roberts, as warden of the state prison of Wisconsin, under a warrant of commitment, a certified copy of which is hereto attached and made a part of this answer, and marked "Exhibit A," and the said John J. Roberts further answering alleges upon information and belief that the said Edward Eckart was duly tried and convicted of the crime of murder in the first degree in the Circuit Court for Jefferson county, Wisconsin. That a certified copy of the minutes of the court upon his trial and conviction is hereto attached, made a part of this answer, and marked "Exhibit B." That the said Edward Eckart has heretofore prayed for a discharge by the Supreme Court of the state of Wisconsin, that being the court of last resort in said state and being the court having jurisdiction to pass upon and determine the regularity of the indictment, trial, conviction, sentence and confinement of the said Edward Eckart.

That a certified copy of the petition of the said Edward Eckart to the said Supreme Court of the state of Wisconsin, and of the decision of said Supreme Court of the state of Wisconsin, and its order and judgment entered upon the petition of said Edward Eckart is hereto attached, made a part of this answer, and marked "Exhibit C." That for further answer is returned the affidavit of W. H. Rogers, who was district attorney of Jefferson county, Wisconsin, at the time of the trial and conviction of the said Edward Eckart. That the affidavit of the said W. H. Rogers is hereto attached, made a part of this answer and marked "Exhibit D."

That for further answer is also returned the affidavit of Charles F. Krebs, who was clerk of the circuit court for Jefferson county during the time of the trial and conviction of the said Edward Eckart. That the affidavit of the said Charles F. Krebs is hereto attached, made a part of this answer and marked "Exhibit E."

That the said Edward Eckart, as this respondent is informed and believes, is justly, rightfully and lawfully detained, and that the matter of his detention has been finally adjudged by the Supreme Court of the state of Wisconsin.

Therefore, this respondent makes this answer to the order to show cause issued by this court in said matter, and prays that the petition of the said Edward Eckart for a writ of habeas corpus be denied.

JOHN J. ROBERTS,
Respondent.

STATE OF WISCONSIN, } ss.
Fond du Lac County. }

John J. Roberts, being first duly sworn, on oath says that he is the warden of the Wisconsin state prison, and that he is the John J. Roberts who makes the foregoing answer to the order to show cause issued by the Supreme Court of the United States in the above entitled matter. That he has read the foregoing answer, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

JOHN J. ROBERTS.

Subscribed and sworn to before me this 20th day of February, A. D. 1897.

JACOB FUSS,
Notary Public.

"EXHIBIT A."

Copy of commitment of Edward Eckart to the Wisconsin State Prison.

JEFFERSON COUNTY CIRCUIT COURT.

The State of Wisconsin)
against
Edward Eckart.)

Certificate of Conviction and Sentence.

I, Charles F. Krebs, clerk of said Bircuit Court, do hereby certify, that at a general term of said Circuit Court, begun and held at the court house in the village of Jefferson on the 4th day of February, A. D. 1878, the said Edward Eckart was in due form of law convicted of the crime of murder in the first degree and upon such conviction the said court did on the 13th day of April, A. D. 1878, pass sentence upon the said Edward Eckart as follows:

That you, Edward Eckart be punished by confinement in the state prison of the state of Wisconsin at hard labor for and during the remainder of your natural life from this day at 12 o'clock M., and that the first day of your confinement be solitary.

Given under my hand and seal of said Circuit Court, at the court house, in the village of Jefferson (Seal) in said county, this 13th day of April, A. D. 1878.

(Signed) CHARLES F. KREBS,
Clerk.

The above is a true copy of the commitment under which Edward Eckart is held.

JOHN J. ROBERTS,
Warden.

"EXHIBIT B."

State of Wisconsin,)
Jefferson County.) ss.

I, James L. Cook, clerk of the circuit court for Jefferson county, Wisconsin, do hereby certify and attest that I have been clerk of the Circuit Court for Jefferson county since the 4th day of January, A. D. 1897, and that as such clerk of the Circuit Court for Jefferson

county I have in my possession and custody the minute book of such Circuit Court for Jefferson county showing the proceedings had and taken at each term of court thereof in relation to all cases pending before said court, and also the court calendar with minutes of the presiding judges thereon, which books and records are required by law to be in my custody and control; that the following are true and perfect copies of all court minutes in relation to the case of the state of Wisconsin vs. Edward Eckart, who was tried at the February, 1878, term of said Circuit Court for Jefferson county, to-wit:

TUESDAY, February 12th, 1878.

Court opened pursuant to adjournment. His Honor, Judge Small, presiding.

The State of Wisconsin vs. Edward Eckhart. } The defendant having been duly arraigned in open court and his information having been read to him and he being requested to plead to the same, entered his plea of not guilty.

TUESDAY, April 9th, 1878.

State of Wisconsin vs. Edward Eckhart. } Harlow Pease assigned attorney for defendant.

State of Wisconsin vs. Edward Eckart. } This case having been reached in its order in the calendar, a jury was duly impaneled. Defendant objects for calling a jury without a full panel. Objections overruled. Exception. Jurors sworn as to their competency.

1, P. W. Hibard; 2, Wm. Schoonover; 3, Geo. Kerns; 4, Wm. McCann; 5, J. B. Minor; 6, Milo Jones; 7, Jos. Schwellenbach; 8, L. L. Stetson; 9, W. F. Reynolds, 10, C. Griggs; 11, Elija Faville; 12, Orvis Vaughn; 13, James Wilson; 14, Albert Demerit; 15, Jas. McHugh; 16, Jacob Langlotz; 17, J. D. Waterbury; 18, Ph. C. Quentmeyer; 19, Wm. Dew; 20, H. E. Humphry; 21, Adams Smith; 22, Jacob Maydole; 23, J. C. Tilton; 24, Harvey Foster; 25, J. C. Reul; 26, L. Orrendorf; 27, James Webster.

State of Wisconsin vs. Edward Eckart. } The court ordered the sheriff to sumon 6 talesmen. The following were summoned: 1, Adams Smith; 2, Jacob Maydole; 3, J. C. Tilton; 4,

Harvey Foster; 5, John C. Reul; 6, L. Orrendorf; the same being exhausted the court ordered the sheriff to summon 6 more talesmen, the following named persons were summoned: 1, James Webster; 2, J. C. Wilson; 3, R. W. Clark; 4, A. A. Karg; 5, J. M. Storms; 6, George Turner.

NAMES OF JURORS.

1, Delos Vail; 2, Thos. McGee; 3, Henry Carman; 4, William Piper; 5, John Thomas; 6, Wm. McCann; 7, W. F. Reynolds; 8, C. Greggs; 9, Elijah Faville; 10, Albert Demerit; 11, William Dew; 12, James Webster.

JURY SWORN.

Order made and entered, on motion of attorney for the defendant to have all witnesses excluded from the court room who are not on stand, on both sides.

WITNESSES SWORN.

1, Albert Allen; 2, D. J. Barnes; 3, J. C. Sawyer; 4, LeRoy Rankin; 5, Perry Wheeler; 6, W. M. Smith; 7, Chas. Whitney; 8, Geo. Prestige.

State of Wisconsin } Trial resumed.
vs. } Witnesses sworn.
Edward Eckart. } 9, Charles Lawrence.

Now comes the District Attorney, W. H. Rogers, Esq., and returns into court a subpœna with affidavit of service upon L. A. Coss and Thomas Butler, and asks the court for an attachment against said L. A. Coss and Thomas Butler for non-attendance as witnesses in this case. Attachment ordered by the court, issued and delivered to the sheriff.

State of Wisconsin } Now comes the sheriff and re-
vs. } turns into court 5 subpœnas duly
Edward Eckart. } served. The court ordered the sheriff to provide for the jury meals and lodging during the pendency of this action and to appoint such special deputies as he may deem necessary. The following deputies were appointed: P. W. Hibbard and John Spangler.

WEDNESDAY, April 10th, 1878.

Court opened pursuant to adjournment.

State of Wisconsin vs. Edward Eckart. } Jury called. All present. Trial resumed.

State of Wisconsin vs. Edward Eckart, } Witnesses sworn. 10 J. F. Miller, 11 S. H. Coss, 12 Thomas Butler, 13 Mary Christiansen, 14 Earl Newton, 15 Mr. Hamilton, 16 Jas. Golden. State rests. Witnesses sworn for defendant. 17 Mr. Trisell, 18 Mr. McPheron, 19 F. M. Allen, 20 E. S. Wright. Now comes the defendant and returns a subpœna in this action with proof of service upon L. C. Bicknell whereupon on reading and filing said subpœna and return the court orders an attachment to be issued for the said L. C. Bicknell. Attachment issued and delivered to the sheriff.

State of Wisconsin vs. Edward Eckart. } Now comes the sheriff and returns into court three subpœnas duly served.

State of Wisconsin vs. Edward Eckart. } Witnesses sworn. 22 L. C. Bicknell. Defendant rests.

State of Wisconsin vs. Edward Eckart. } Testimony closed. Case argued by W. H. Rogers, district attorney, for the state, and by Harlow Pease on the part of the defendant. Argument closed. The court having charged the jury they retire in charge of Alonzo Brown, a sworn officer, to deliberate upon a verdict, and the same day return into court and file their verdict as follows:

JEFFERSON, WIS., April 10th, 1878.

"We the jury in the case State of Wisconsin vs. Edward Eckart find him guilty."—Wm. N. Dew, Foreman.

Prisoner remanded back to jail.

State of Wisconsin vs. Edward Eckart. } Now comes Harlow Pease and files the following order Circuit Court Jefferson county. Information charging murder in the first degree.—February term 1878.

Harlow Pease, an attorney of this court having been assigned by the court as counsel for the defendant; the court certifies that said Pease is entitled to compensa-

tion for five days (5) service in said defense upon the preparation and trial thereof at $15.00 per day, and the clerk of this court is hereby directed to issue to said Harlow Pease a court certificate for said amount.

Dated April 10th, 1878.

By the court: DAVID W. SMALL, Judge.

Now comes Maria Christiansen and files petition and affidavit and the following order of the court:

Order: Upon the foregoing affidavit the clerk is directed to issue a court certificate to the witness, Maria Christianson for ten and 60-100 dollars expenses, and for $15.00 as ordered by the court, in all $25 60-100. By the court, David W. Small, Judge.

FRIDAY, APRIL 12TH 1878.

State of Wisconsin vs. Edward Eckart. } Now comes the defendant by his attorney, Harlow Pease, and files motion for a new trial, and moves the court in arrest of judgment in this action.

Motion overruled, excepted to by defendant's attorney.

SATURDAY, APRIL 13TH, 1878.

Court opened pursuant to adjournment.

State of Wisconsin vs. Edward Eckart. } The defendant having been brought into court to receive sentence and refusing to be heard in his own behalf, the court proceeded to pass sentence as follows:

"That you, Edward Eckart be punished by confinement in the state prison of the state of Wisconsin at hard labor for and during the remainder of your natural life from this day at 12 o'clock M., and that the first day of your confinement be solitary.

I further certify: That the following is a true copy of the entries in the court calendar in relation to said case of the State of Wisconsin vs. Edward Echart in my custody as aforesaid, to-wit: 9. The State of Wisconsin vs. Charles Whitney and Edward Eckhard. Murder. W. H. Rogers, district attorney. Case called April 9th, 1878, 10 a. m. and at 2 p. m., jury sworn. 4 p. m. April 10th, case closed and jury return a verdict of guilty of murder in the first degree as against defendant, Edward Eckart.

And I do further certify and attest: That said February, 1878, term of said Circuit Court for Jefferson county opened according to law on the 4th day of February, A. D., 1878, and was duly continued from day to day thereafter until the 13th day of April, 1878, at the end of said 13th day of April, 1878, when the same was by order of the court continued to an uncertain day; that on all the days shown by the minutes in said case as above set forth the said court was duly in session as of said February, 1878 term, and that David W. Small was the judge presiding during all of said days mentioned in the above minutes as shown by the orders and minutes of the court on said minute book. That my office is a public office of the state of Wisconsin and that the records from which the above extracts are made are public records and are the judicial records of the county of Jefferson and are in my possession and control in my capacity as clerk of said Circuit Court for Jefferson county; that the copies of said minutes and proceedings relative to said case of the State of Wisconsin vs. Edward Eckart have been duly compared by me with such original records and minutes in my possession as above and that they are true and perfect copies of said original minutes and entries.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court for Jefferson county, Wisconsin, on this 18th day of February, A. D., 1897.

[SEAL.] JAMES L. COOK,
Clerk of Circuit Court, Jefferson county, Wis.

State of Wisconsin, } ss.
Jefferson County. }

I, John R. Bennett, circuit judge of Jefferson county, Wisconsin, do hereby certify: That I am the sole and presiding judge of the Circuit Court for Jefferson county, Wisconsin; that James L. Cook, whose name is attached to the above certificate and attestation, is clerk of the said Circuit Court, and that his said signature is genuine, and that the said certificate and attestation signed by him as above is in due form and is according to the laws of the state of Wisconsin.

In witness whereof, I have hereunto set my hand this 18th day of February, A. D. 1897.

(Seal) JOHN R. BENNETT,
Circuit Judge.

EXHIBIT C.

WAUPUN, Wis., Sept. 9, 1893.

HON. J. B. WINSLOW,
Associate Justice Wisconsin Supreme Court,
Madison, Wis.

Hon. Sir: I herewith respectfully pray your Hon. that the Supreme Court of Wisconsin will take cognizance of the within enclosed verified petition, for a writ of habeas corpus, and that the said Honorable Supreme Court of Wisconsin may give your petitioner a decision ont he within enclosed verified petition, at as early a date as the said Honorable Supreme Court can convenient decide the questions which are raised therein. And your petitioner would further say to this Honorable Supreme Court that he, the said petitioner, has no means wherewith to pay an attorney to present this petition or to make such application to this Honorable Court. In "Article first of the state constitution," is found as follows, "That every person should receive justice without having to buy it."

Your petitioner would respectfully pray that a certified copy of the decision as rendered on this petition may be sent to him, the petitioner.

Respectfully,
EDWARD ECHART,
Waupun, Wis., State Prison.

State of Wisconsin, } ss.
Jefferson County. }

I, M. L. Piper, clerk of the Circuit Court in and for the county and state aforesaid, do hereby certify that I have compared the annexed and foregoing with the original information and verdict in the case of the State of Wisconsin vs. Edward Echart, now on file in my office, and find it to be a correct transcript of the same and the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 20th day (Seal.) of May, A. D. 1893.

M. L. PIPER,
Clerk.

VERDICT.

JEFFERSON, WIS., April 10, 1878.

We, the jury in the case, State of Wisconsin vs. Edward Eckart, find him guilty.

WILLIAM N. DEW,
Foreman.

INFORMATION.

The State of Wisconsin
against
Edward Eckart.
} State of Wisconsin, Jefferson County, in Circuit Court.

I, W. H. Rogers, district attorney for said county, hereby inform the court that on the 13th day of December, in the year 1877, at said county, Edward Eckart did wilfully, feloniously and of his malice aforethought kill and murder one Charles Peterson, against the peace and dignity of the state of Wisconsin.

Dated February 11th, 1878.

W. H. ROGERS,
District Attorney.

State of Wisconsin
vs.
Edward Eckart.

The defendant having been brought into court to receive sentence, and refusing to be heard in his own behalf, the court proceeded to pass sentence as follows:

"That you Edward Eckart be punished by confinement in the state prison of the state of Wisconsin at hard labor for and during the remainder of your natural life, from this day at 12 o'clock M., and that the first day of your confinement be solitary."

State of Wisconsin,
Jefferson County,
} ss.

I, M. L. Piper, clerk of the circuit court in and for the county and state aforesaid, do hereby certify that I have compared the annexed and foregoing with the original entry in the Minute Record, vol. B, p. 613, of the Circuit Court for Jefferson county, Wis., in the case of the State of Wisconsin vs. Edward Eckart, now of

record in my office, and find it to be a correct transcript of the same and the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 23d day of May, A. D., 1893.

(Seal.)

M. L. PIPER,
Clerk.

To the Hon. Supreme Court of Wisconsin, Madison, Wis.

Petition for Writ of Habeas Corpus, Edward Eckart, Petitioner.

Your petitioner would most respectfully set forth and show to this Hon. Court: That P. B. Lamoreux is the warden of the Wisconsin state prison, which is situated in the county of Dodge and city of Waupun, in the aforesaid state of Wisconsin.

That the said warden, P. B. Lamoreux, Esq., unlawfully restrains your petitioner of his liberty, contrary to the constitution of the United States and the laws enacted thereunder, and without the due process of law guaranteed by the 14th amendment of that instrument.

1st. That the said Edward Eckart is not committed or detained by virtue of any process, judgment, order, or execution specified in section three thousand four hundred and eight of the revised statutes of the state of Wisconsin, or any act amendatory thereof.

2nd. That the cause or pretense of such imprisonment is as follows, to-wit: That on the 11th day of February, 1878, an information was made by W. H. Rogers, district attorney of Jefferson county, Wisconsin, in the circuit court of said county, wherein the state of Wisconsin was plaintiff and your petitioner were defendant, and which said information was duly filed in the Circuit Court of Jefferson county, on the 12th day of February, 1878, and thereafter, on the 8th day of April, 1878, said defendant, your petitioner, was brought before said court for trial on said information, and thereafter, at a term of said court, begun on the fourth day of February, 1878, cause was tried before the Hon. D. W. Small, of the second judicial circuit of the state of Wisconsin (said cause being tried in the twelfth judicial circuit of the state of Wisconsin), and a jury duly impanelled and charged by the judge, and upon such aforesaid information said jury returned a simple verdict of guilty, which verdict was received and recorded, and thereupon the said

Circuit Court, on the 13th day of April, 1878, sentenced your petitioner to be confined in the state's prison for the term of his natural life, and, your petitioner was therefore and thereupon, under a certificate of said court, taken to the said prison and there bound over upon such certificate and commitment to the prison thereof, and ever since has been and now is therein confined, upon such certificate issued upon the sentence rendered upon the information filed and presented by the said W. H. Rogers, district attorney of Jefferson couny, and that certified copies of such information, verdict and sentence by the court are annexed to this petition marked "Exhibit A."

3d. That the said imprisonment and restraint of your petitioner is illegal and void and contrary to the law and to the constitution of Wisconsin, and the amendments thereof, and the constitution of the United States and the amendments thereof, for the following reasons, to-wit:

4th. That the said charge as set forth in the information and upon which said trial and conviction was had, was the offense of murder at the common law, defined and being the offense as set out in section four thousand three hundred and forty-six of chapter one hundred and eighty-one of the revised statutes of Wisconsin, and which is as follows, to-wit:

"Section 4346. The killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of any other, while such other is engaged in the perpetration of any crime or misdemeanor, not amounting to a felony, or in an attempt to perpetrate any such crime or misdemeanor, in cases where such killing would be murder at the common law, shall be deemed manslaughter in the first degree, and shall be punished by imprisonment in the state prison not more than ten years nor less than seven years."

5th. That the sentence imposed upon your petitioner was unwarranted in the law and he is entitled to his discharge thereon:

1st. Because the jurisdiction of the court was exceeded as well as to the subject matter of the offense as to the law and the person of your petitioner and as to each and all of the same.

2. Because the information does not charge your petitioner with premeditated murder. Hence the information is wanting in every essential particular to

charge the crime of murder in the first degree, as provided in section four thousand, three hundred and thirty-eight of chapter one hundred and eighty-one of the revised statutes of Wisconsin, which is as follows, to-wit:

"Section 4338. Such killing when perpetrated from premeditated design to effect the death of the person killed, or of any human being, shall be murder in the first degree, and the person who shall be convicted of the same, shall be punished by imprisonment in the state prison during the life of the person so convicted."

3. Because, if the information charges a higher crime than manslaughter in the first degree, then your petitioner was charged with three different crimes, which is contrary to law, which crimes are provided for by three distinct statutes, and according to law no person can be tried for more than one offense, where the punishment is of three different, distinct grades and as it is provided by statutes, murder in the first degree is life, murder in the second degree is from fifteen to twenty-five years, murder in the third degree is from ten to fourteen years, thereby making three distinct crimes, with three distinct modes of punishments for the three different offenses.

4. Beeause the verdict fails to show what crime your petitioner was convicted thereof. Hence, the court being unable to determine from the record the crime of which your petitioner had been convicted, the court then had nothing upon which it could pronounce sentence for life upon your petitioner.

5. Because the pretended sentence and judgment pronounced by the court upon your petitioner was not authorized by law under any circumstance in the particular case made by the pleadings, whether the trial proceeded regularly or otherwise; and therefore the process under which your petitioner is held is not authorized by any judgment or order of any court nor by any provision of law.

That the Circuit Court of Jefferson county did not have the jurisdiction to impose a sentence for life upon your petitioner, and, the present pretended sentence being illegal and void, your petitioner is entitled to his discharge thereon.

6. That said sentence is unconstitutional and null and void and contrary both to the constitution and amendments of the state of Wisconsin and the United States.

Said sentence is contrary to the constitutional provision of the state of Wisconsin contained in section eight (8) of article one (1) of the constitution of Wisconsin as amended by a vote of the people on November 8th, 1870, which among other things prescribes as follows, to-wit:

"No person shall be held to answer for a criminal offense without due process of law," etc.

Said sentence is contrary to and in violation of the 14th amendment to the constitution of the United States, and which among other things declares as follows, to-wit:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law."

That the sentence and judgment imposed upon your petitioner and the restraint thereunder of your petitioner are unconstitutional and void and contrary to article sixth of the constitution of the United States, which among other things declares as follows, to-wit.:

"This constitution . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any other state to the contrary notwithstanding."

7th. That the sentence and judgment imposed upon your petitioner and his restraint thereunder are unconstitutional and void and contrary to section 6th of article 1st of the constitution of Wisconsin, which among other things declares as follows, to-wit:

"Excessive bail shall not be required, nor cruel and unusual punishment inflicted."

That the sentence and judgment imposed upon your petitioner and his involuntary restraint thereunder at hard labor are unconstitutional and void and contrary to the 13th amendment to the constitution of the United States, which among other things declares as follows, to-wit:

"Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction."

That your petitioner having been deprived of his writ of error, through the fault of his attorney in not applying in time.

That the state courts having now lost all jurisdiction in the matter, and cannot at this late day issue or hear a writ of error in this case under the statutes of Wisconsin.

That your petitioner's only remedy now is by habeas corpus.

Wherefore your petitioner prays that a writ of habeas corpus may issue, commanding the warden of said state prison to produce the body of the said Edward Eckart at such time and place as this honorable court may designate. Then and there to show cause, if any he can, why your petitioner should not be discharged from such illegal custody as alleged.

EDWARD ECKART.

State of Wisconsin, } Edward Eckart, being duly
County of Dodge. } sworn according to law says, that he is acquainted with the contents of this petition and that the matters and things therein are true to the best of his knowledge and belief.

EDWARD ECKART.

Subscribed and sworn to before me, this 25th day of July, 1893.

(Seal.)

JACOB FUSS,
Notary Public, Dodge Co.

IN SUPREME COURT, STATE OF WISCONSIN.
In re Petition of Edward Eckart for writ of habeas corpus.

WINSLOW, J. The petitioner was tried for murder April 10th, 1878, upon an information charging generally wilful and felonious murder with malice aforethought; a simple verdict of guilty was rendered, not specifying any degree upon which he was sentenced to imprisonment for life. He now asks for a writ of habeas corpus and for his discharge from imprisonment thereon, because he claims that no judgment could lawfully be pronounced on the verdict under the law as settled in Hogan v. State, 30 Wis., 428, and Allen v. State, 85 Wis., 22. It seems that the judgment was erroneous under these cases, but that fact does not authorize his discharge upon habeas corpus. The court had jurisdiction of the person and of the offense, but made a mistake in the judgment. Habeas corpus reaches

only jurisdictional defects, and there is no such defect here. The case is ruled by the case of Graham and McDonald, 74 Wis., 450.

By the court: Writ denied.

In the matter of the petition of Edward Eckart for a writ of habeas corpus.

The court being now fully advised of and concerning the petition and motion of the said petitioner, Edward Eckart, for a writ of habeas corpus herein, it is now here ordered and adjudged by this court that the said petition be and the same is hereby denied.

In the matter of the application of Edward Eckart for a writ of habeas corpus.

September 15, 1893. Petition for a writ of habeas corpus filed

September 26, 1893. Petition for writ of habeas corpus denied.

State of Wisconsin, }
Supreme Court. }

I, Clarence Kellogg, clerk of the Supreme Court of the state of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record, judgment and opinion of the court and docket entries on file in my office in the above entitled cause and that it is a correct transcript therefrom, and of the whole thereof.

In testimony, whereof, I have hereunto set my hand and affixed the seal of said court at Madison, (Seal.) the thirteenth day of February, A. D. 1897.

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

EXHIBIT D.

State of Wisconsin, }
Walworth County. } ss.

W. H. Rogers, being duly sworn, on oath says that he resides at Fort Atkinson, Jefferson county, state of Wisconsin. That in the year 1878, and during the whole of said year, affiant was district attorney of said Jefferson county, and as such officer conducted the prosecution of the case of The State of Wisconsin against Edward Eckart. That the Honorable David

W. Small, Circuit judge of Wisconsin, presided over the circuit Court for said Jefferson county during said trial and the whole thereof, and duly sentenced said Edward Eckart. That if the minutes of the clerk of said court show that Hon. H. S. Conger, circuit judge, presided at said trial or any part thereof, such entry is a clerical error, for the reason that said H. S. Conger did not preside at such trial or any part thereof.

W. H. ROGERS.

Subscribed and sworn to before me, this 17th day of February, 1897.

M. G. JEFFRIS,
Notary Public for Wisconsin.

EXHIBIT "E."

STATE OF WISCONSIN, } ss.
Jefferson County. }

Charles F. Krebs being first duly sworn on oath says, that he is a resident of the city of Jefferson, Jefferson county, Wisconsin, and has been for many years last past; that he was clerk of the Circuit Court for Jefferson county during the February, 1878, term of such court and was such clerk at all times hereinafter mentioned; that said term began on the 4th day of February, 1878, and ended on the 13th day of April, 1878; that Hon. H. S. Conger, circuit judge, presided at said term on the 4th, 5th, and 6th days of February, 1878, and then called in Hon. David W. Small, circuit judge, who presided at said term of court during all the remaining days of holding the same; that all proceedings relating to the case of the State of Wisconsin vs. Edward Eckart were had and taken before said David W. Small, presiding judge, and while he was so presiding at said court; that this affiant is acquainted with the handwriting of said Hon. David W. Small, circuit judge; that he has examined the entries in relation to said case of State of Wisconsin vs. Edward Eckart in the judge's calendar for said February, 1878, term which entries are as follows, to-wit: "Case called April 9th, 1878, 10 a. m. and at 2 p. m., jury sworn. 4 p. m., April 10th, case closed and jury returned verdict of

guilty of murder in the first degree as agst. deft. Edward Eckhard."; that all of said entries are in the handwriting of Hon. David W. Small, circuit judge.

CHAS. F. KREBS.

Subscribed and sworn to before me this 17th day of February, A. D., 1897.

D. H. BROWN,

Deputy Clerk, Circuit Court, Jefferson County, Wis.

[SEAL.]

Office Supreme Court, U. S.
MAR 19 1897
JAMES H. McKENNEY,
CLERK

166-481

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

ORIGINAL NO. 14.

IN THE MATTER OF EDWARD ECKART,

PETITIONER.

BRIEF.

W. H. MYLREA,

Attorney General of Wisconsin.

DEMOCRAT PRINTING COMPANY, MADISON, WIS.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

ORIGINAL, NO. 14.

IN THE MATTER OF EDWARD ECKART, PETITIONER.

STATEMENT OF FACTS.

The above petitioner was duly tried and convicted of murder in the first degree by the circuit court of Jefferson county in the month of April, 1878. By virtue of this conviction the prisoner was sentenced and confined at hard labor in the state prison for the remainder of his natural life, pursuant to chapter 64 of the Revised Statutes of Wisconsin, 1858, and acts amendatory thereof.

The information under which the petitioner was convicted was what is commonly known as a "statutory information." It charged the prisoner with the offense in the general language of the statute, without setting forth the specific facts. (Sec. 12, chapter 137, laws of 1871.) A copy of this information is found on page 10 of the printed return.

No objection was made to the form or sufficiency of this information at the time of the trial, nor is any now made by counsel for the petitioner. At the close of the trial the foreman of the jury returned a written verdict, which was copied into the minutes of the clerk of the court as follows, to-wit:

"Jefferson, Wis., April 10, 1878.

"We the jury in the case, State of Wisconsin vs. Ed-"ward Eckart, find him guilty.

"WILLIAM N. DEW,
"Foreman."

(Printed return, page 10.)

It further appears from the certified copy of the court calendar for the term at which Eckart was tried, and under the title of his case as entered thereon, that there is a further entry in the handwriting of the trial judge in regard to the verdict of the jury, which states that the jury returned a verdict of "guilty of murder in the first degree, as against the defendant, Edward Eckart." (See printed return, foot of page 7.)

The commitment, a certified copy of which is found on page 3 of the printed return, states that "said Edward Eckart was in due form of law convicted of murder in the first degree, and upon said conviction, the said court did, on the 13th day of April, A. D. 1878, pass sentence upon the said Edward Eckart as follows:" etc.

In the petition herein it is sought to make it appear that the *trial* of the petitioner was had before the Hon. H. S. Conger, and that the *judgment* of the court was pronounced by Hon. David W. Small, the presiding judge of another circuit, who was not present at the trial. This is in fact untrue. A certified copy of the clerk's minutes shows that on Tuesday, Feb. 12th, 1878, court was opened with Judge Small as the presiding judge; that at that time the defendant was duly arraigned and the court received his plea of not guilty; that the trial was commenced on April 9th, 1878, and that on that day and sundry other days to the close of the trial, orders were made in said court in said action by Hon. David W. Small, the presiding judge at the trial. (See printed return, pp. 4, 5, 6 and 7.)

The clerk of the circuit court certifies that from and

after the fourth day of February, 1878, until the close of the thirteenth day of April, 1878, upon which day the prisoner was duly sentenced, that Hon. David W. Small was the judge presiding during all of the days upon which court was held between said dates. (See printed return, page 8.)

ARGUMENT.

The petition and return present two questions:

1. Does the record show that the defendant was duly convicted of murder in the first degree?

2. Can this court by writ of habeas corpus grant relief from an erroneous judgment by a state court?

I.

1. Does the record show that the defendant was duly convicted of murder in the first degree?

The contention of the petitioner is that under the form of written verdict in this case, no valid judgment could be rendered. That the information charges only manslaughter at the common law; that a verdict of guilty under such an information would only authorize a sentence of a limited number of years' imprisonment.

While counsel admit that under such an information the jury might convict of one of the degrees of murder, yet that a failure upon the part of the jury to designate the degree of murder of which they found the prisoner guilty renders the judgment *void* in excess of the penalty of manslaughter. A verdict of this character has been held *erroneous*, but not *void*, in the state of Wis-

consin, and that on a writ of error the judgment will be reversed and the prisoner granted a new trial.

Allen vs. State, 85 Wis., 22.

Under the statutes of Wisconsin, cited in the brief of counsel, the petitioner could have reversed the judgment founded upon this verdict, and had a new trial within two years from the date of the sentence. Suppose the petitioner had been convicted of some offense the punishment for which was one year's imprisonment, and that the court erroneously rendered judgment that he be imprisoned for one and one-half years. Under the position of counsel, if a writ of habeas corpus were brought after the year had expired and before the sentence had terminated, the prisoner would be entitled to his release without making application for a writ of error, which is the only method provided for reviewing criminal cases in the state of Wisconsin. We do not think this is good law for the reason that by "due process of law" an erroneous judgment can only be reviewed by a writ of error. In this case, if the courts of Wisconsin had jurisdiction of the subject matter and of the person, the judgment was *res adjudicata* as to this petitioner, except the judgment be set aside or reversed, as provided by the statutes.

The rule of law is clear that every presumption and intendment must be made in favor of the regularity of the proceedings of courts of record. From the return in this case it appears that the trial judge, in his own handwriting, duly entered upon the calendar of that court, which was undoubtedly one of the records of that court, the fact that the jury found the defendant guilty of murder in the first degree. (See return, page 7.)

The verdict in a criminal case need not be in writing and until later years was usually delivered orally.

State vs. Glass, 50 Wis., 224.

28 A. & E. Ency. of Law, 407.

The commitment issued under the seal of the court also recites that the prisoner was convicted by the jury of murder in the first degree, and that the sentence of the court was in pursuance to that finding by the jury. We submit that in this case it is the duty of the court to reconcile these entries and to so construe them as to render the actions of the court in harmony with its records. It is therefore fair to presume that after the foreman of the jury returned this informal verdict that the trial judge polled the jury as to the degree of murder of which they found the defendant guilty. That in response to their answer he inserted in the calendar, in his own handwriting, the fact that the jury found the prisoner guilty of murder in the first degree. There is nothing in the records in this case to show that the irregular verdict, found alone in the clerk's minutes, was received and adopted as a part of the official record in this case by the court, except the mere fact that the return by the jury was copied into the minutes of the clerk. In the early history of the law it was customary for the clerks of the several courts, in addition to the judges, to keep an account of the proceedings, but these minutes were not treated as a part of the record and as verities until examined, corrected and signed by the judge at the close of the term of court. In this case the judge never signed the clerk's minutes; therefore the entries in the calendar in the judge's handwriting must be the true record of the proceedings of the court.

In a New Hampshire case, the jury returned a verdict of not guilty orally and in open court. The written verdict which the foreman undertook to make was irregular

and was rejected by the court, who polled the jury and directed a proper record to be made of the true verdict, and the judgment upon this verdict was upheld.

Lord vs. State, 16 N. H., 326

If the jury in this case did not in fact render a verdict of guilty of murder in the first degree, as recorded by the trial judge of that court, we are at a loss to understand how the eminent counsel who originally defended this defendant in 1878 did not seek to reverse this judgment. Nearly six years prior to that trial the supreme court of the state of Wisconsin, in Hogan vs. State, 30 Wis., 428, had already decided that it was necessary in trials under informations similar to this one for the jury to designate specifically the degree of murder or manslaughter of which they found the prisoner guilty.

II.

2. Can this court by writ of habeas corpus grant relief from an erroneous judgment by a state court?

As already shown in counsel's brief, the petitioner could have had this judgment reversed, and a new trial granted on a writ of error within two years from the date of the sentence. This he failed to do. Nearly twenty years after he brought a writ of habeas corpus in the supreme court of Wisconsin, which was denied. By the decisions of this court the proceeding of habeas corpus is a civil action. As against state officers in their official capacity it must first be brought to final judgment in the highest court of the state. It may then be reviewed here by writ of error within two years thereafter, the same as any judgment of any of the inferior federal courts. (Revised Statutes of U. S., sections 1003–1008.)

The petition to the supreme court of Wisconsin for a writ of habeas corpus was denied September 26, 1893.

In re Eckart, 85 Wis., 681.

More than two years had elapsed since that judgment in the supreme court before this proceeding was begun. It was too late to obtain a writ of error from this court, and therefore the petitioner seeks by writ of habeas corpus to annul the judgment in Wisconsin.

If the proceeding upon a writ of habeas corpus be a civil action, we ask this court why a judgment of a competent court having jurisdiction of the subject matter and the person, is not *res adjudicata* between the same parties, unless reviewed according to the procedure provided by the law of the land? If we are correct in this position, then this petitioner should have applied to this court for a writ of error to review the judgment of the supreme court of the state of Wisconsin, rendered in September, 1893, and failing so to do, is barred from attacking that judgment in any other proceeding.

The law of Wisconsin is undoubtedly that a judgment sentencing the prisoner to imprisonment for a longer term than the statutes warrant is merely *erroneous*, and not *void* for want of jurisdiction. The supreme court of Wisconsin say that "the judgment was doubtless erroneous and would be reversed on a writ of error, but the judgment was not *void;* the court had jurisdiction of the person and subject matter of the offense, and made a mistake in the judgment. For mere error, no matter how flagrant, the remedy is not by habeas corpus. The law is well settled in this court that on habeas corpus only jurisdictional defects are inquired into. The writ does not raise questions of error in law or irregularities in the proceedings." This

language is quoted from the case of Graham, 74 Wis., 450.

This doctrine of the supreme court of the state of Wisconsin was afterwards affirmed by this court in United States vs. Pridgeon, 153 U. S., 48, where they cite among other authorities the above decision from the supreme court of the state of Wisconsin. In the decision of the Pridgeon case this court say that "many well considered authorities in England as well as in this country hold that where there is jurisdiction of the person and of the offense, excess in the sentence of the court beyond the provisions of law is only voidable in proceeding upon a writ of error." In the same case it was held that "under the writ of habeas corpus the inquiry is addressed not to errors, but to the question whether the proceedings and the judgment rendered therein are for any reason nullities, and when it is affirmatively shown that the judgment or sentence under which the petitioner is confined is *void* he is entitled to his discharge." The judgment sentencing Eckart to the state prison of Wisconsin for the remainder of his natural life was not *void*, but *voidable* only, in a proper proceeding provided by the laws of the state of Wisconsin. The judgment therefore is not a nullity and cannot be reviewed in this court upon habeas corpus.

Mr. Justice Jackson, speaking for the court In re Frederick, (149 U. S., 73) says:

"While the writ of habeas corpus is one of the remedies for the enforcement of the right of personal freedom, it will not issue as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners. Being a civil process, it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense."

Counsel for the petitioner cite *Ex parte* Bigelow, 113

U. S., 328, in behalf of the prisoner that after the valid portion of the sentence has been served the excess is beyond the jurisdiction of the court. He argues that therefore this court by a writ of habeas corpus should release the prisoner held under such a sentence. We fail to see how the case cited by counsel is in his favor, but, on the other hand, it would seem to us to be conclusive in behalf of the warden of the state penitentiary. In that case the party was tried in the District of Columbia, and the sentence and judgment therein rendered was reviewed at a general term. An application for a writ of habeas corpus was made to the supreme court of the United States, on the ground that judgment was void on account of former jeopardy. The writ was denied, and this court used this language in regard to that case:

"If the prosecution as thus stated brings the prisoner's case within this principle of the constitution, the court committed an error. On account of this error, among others, the case was carried by appeal to the court in general term, where the matter was heard by other judges, and, after full consideration, the judgment of the trial court was affirmed. No appeal or writ of error in such cases as that lies in this court. The act of congress has made the judgment of that court conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain. It is said, however, that the court below exceeded its jurisdiction, and that this court has the power in such case, and for that reason, to discharge the prisoner from confinement under a void sentence. The proposition itself is sound, if the facts justify the conclusion that the court of the District was *without authority* in the matter. But that court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner; he was properly brought before the court. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which that court must pass, so far as it was properly a question of law and on which the jury,

under the instructions of the court, must pass, if we suppose any of the facts were such as required submission to a jury."

The court held that the judgment was the exercise of the jurisdiction of the court, and, without giving any opinion as to whether that decision was sound law or not, they deny the application for a writ of habeas corpus, because even if the judgment was erroneous, it was not void or a nullity.

In another case the defendant was convicted in a state court of Missouri, and sentenced to two years' imprisonment in the penitentiary. It was claimed that the prisoner had been twice in jeopardy, and that the judgment of the court in rendering sentence was wholly void. In deciding that case in the circuit court of the Western District of Missouri, Judge Caldwell used this language:

"Assuming the truth of the allegations in the petition, the first question to be determined is whether the district court had jurisdiction, by a writ of habeas corpus, to declare the judgment of the state court a nullity, and discharge the prisonerfrom the imprisonment imposed by it. The district courts of the United States do not possess any supervisory or appellate jurisdiction over the criminal courts of a state. Nor can a writ of habeas corpus be made to perform the office of a writ of error or appeal. Errors in law, however numerous and gross, committed by the trial court in a cause within its jurisdiction, can only be reviewed by appeal or writ of error in the court exercising supervisory or appellate jurisdiction over the trial court in the particular case. It is only where the trial court is without jurisdiction of the person or cause, and a party is subjected to illegal imprisonment in consequence, that the writ of habeas corpus may be invoked, and the party discharged from the illegal imprisonment.

In the case at bar, the criminal court of Jackson county had plenary jurisdiction of the person, the offense, and the cause, and everything connected with it. The petitioner was indicted for violating a criminal statute of the state. The statute defining and punish-

ing the offense was a valid law. The indictment sufficiently charged the offense and the court trying the petitioner had jurisdiction of his person, and exclusive original jurisdiction to try him on the indictment for the offense therein charged. Having such plenary jurisdiction, it was the right and duty of the state court to decide every question that arose in the case, from the beginning to the end of it. Possessed of unquestioned jurisdiction of the case, the court had the same jurisdiction and right to decide questions arising under the constitution and laws of the United States that it had to decide questions arising under the constitution and laws of that state. The state court is under the same high obligations to support, construe and give effect to the constitution of the United States that this court is, and an erroneous interpretation of the constitution of the United States no more affects the court than an erroneous ruling on any other question of law arising in the case. Whether the first jury was discharged without sufficient legal excuse was a mixed question of law and fact, to be determined by the court, or by the court and jury, if the facts were disputed. It is undeniable that the court had jurisdiction to determine that issue. It was the only court that had jurisdiction to determine it in the first instance; and, if it be conceded that the court decided the question erroneously, its jurisdiction over the cause was not thereby lost or in any degree impaired, and its judgment was not void, and is not open to collateral attack. If the state court erred in its rulings on this or any other question, to the prejudice of the petitioner, he has his remedy to correct the error. He can appeal to the supreme court of the state, and if that court denies him any right, privilege or immunity which he claims under the constitution of the United States, he can have his writ of error to the supreme court of the United States. This is the regular, legal and orderly mode of reviewing and revising the judgments of courts in criminal, as well as in civil, cases.

Ex parte Ulrich, 43 Fed., 661.

In the petition herein it is urged that the petitioner is in confinement contrary to the provisions of Article V. and Article XIV. of the amendments to the federal constitution. The fifth amendment to the federal

constitution is a limitation upon the departments of the federal government, and applies to their powers alone. It was designed exclusively as a restriction upon the federal power alone.

Twitchell vs. Pa., 74 U. S., 121.

The fourteenth amendment to the federal constitution is a limitation upon the powers of the states and was adopted for the purpose of compelling the states to grant the same rights and privileges to all parties who were citizens of the United States and of the several states. The amendment also provides as to who should be citizens of the United States and of the several states.

Annotated Constitution, U. S., page 210.

"It is state action of a particular character that is prohibited by the fourteenth amendment. Individual invasion of individual rights is not the subject matter of the amendment."

C. R. C., 109 U. S., 3.

This amendment does not "invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action of the kind referred to."

C. R. C., 109 U. S., 3.

It is very evident that under the fifth amendment to the federal constitution no question can arise. It was not the intention of the fourteenth amendment to guarantee to any individual a trial free from mistake, as counsel seem to think. The whole duty of the state is performed and the protection guaranteed by the federal constitution is accomplished, when the state shall

have furnished such a system or process of law as would have furnished a remedy if duly followed.

In a case from Louisiana, it was claimed that a party had been unlawfully deprived of the office of one of the judges of the supreme court of that state. Upon a writ of error from this court it was held that "the question before us is not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the constitution; irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond a mere examination of the power of the courts below to proceed at all." Kennard vs. Louisiana, 92 U. S., 480.

Applying this rule to the case before us, it would appear that, as was held by our own supreme court, where the trial court has jurisdiction of the offense and the person, although there may be an error in the judgment, the writ of habeas corpus cannot be used to correct errors. That so long as there was a legal proceeding, or due process of law, provided by the state of Wisconsin, for the protection of the petitioner's rights, he had received all of the protection that the fourteenth amendment to the federal constitution guarantees to any individual.

In the case of Belt vs. Jones, 159 U. S., 84, this court says:

"The general rule is that a writ of habeas corpus will not issue unless the court under whose warrant the petition is heard is without jurisdiction, and that it cannot be used to correct errors. Ordinarily the writ will not issue where there is a remedy by writ of error or appeal."

In another case it was held that this court will not on habeas corpus review the proceedings of the court be-

low where the lower court had jurisdiction of the case and person, unless the proceedings below are entirely void.

Ex parte Parks, 93 U. S., 18.

The words "due process of law" have no fixed definite construction of meaning. "Due process of law" is process had according to the law of the land. The process in the states is regulated by the law of the states."

Walker vs. Sauvient, 92 U. S., 90.

In other words, in matters of state jurisprudence the law of the state is the law of the land.

Bittenhaus vs. Johnson and another, 92 Wis., 597.

We regret that the limited time at our disposal will not permit us to prepare a brief in more logical form and order. The importance of this case will be seen when it is understood that a determination in favor of this petitioner will open the doors of the penitentiary of Wisconsin to a number of life prisoners, whose only hope of freedom lies in a technical error of the courts. We cannot believe that it was ever the intention of the framers of the federal constitution to provide that the supreme court of the nation should have supervisory power over all judgments rendered in criminal cases for violation of the state law in the several states.

We respectfully submit that the petition for a writ of habeas corpus in this case should be denied.

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